Supreme Court, U.S
FILED
JUN 25 2004
OFFICE OF THE CLERK

No. 03-1587

In the Supreme Court of the United States

NICOLAS ESTIVERNE
Petitioner

VS.

HIBERNIA CORPORATION, PAULA EADY
AND ST PAUL FIRE AND
MARINE INSURANCE COMPANY
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On or about August 30, 2000, petitioner, Nicolas Estiverne, filed suit in the Civil District Court for the Parish of Orleans, State of Louisiana.[1] Petitioner claimed entitlement to damages allegedly resulting from the production of his financial records pursuant to a valid subpoena. Specifically, petitioner claimed that in 1999, Hibernia Corporation violated and/or failed to comply with the requirements of La. R.S. 6:333 by producing his financial records in response to a subpoena duces tecum issued to Hibernia National Bank by the Louisiana State Bar Association, Office of Disciplinary Counsel (hereinafter referred to as "Office of Disciplinary Counsel").[2] Named as defendants were Paula Eady, Hibernia Corporation and their liability insurer, St. Paul Fire and Marine Insurance Company (hereinafter collectively referred to "Respondents").[3]

The underlying facts are vastly different than those set forth by petitioner. In the fall of 1998, the Office of Disciplinary Counsel was investigating a complaint filed against petitioner, who at the time was a licensed practicing attorney in the State of Louisiana. The Office of Disciplinary

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1 The lawsuit in question was filed only on behalf of petitioner, Nicolas Estiverne. While petitioner argues alleged violations of the rights of his wife, it should be noted that his wife was never made a party to the instant action.

2 Petitioner did not claim or allege violations of the Fourth or Fourteenth Amendments to the United States Constitution in his petition for damages. Additionally, petitioner did not question the constitutionality of Louisiana Supreme Court Rules of Disciplinary Enforcement Rule XIX, §§ 28 and 29.

3 See Appendix A

Counsel requested certain financial records from petitioner as part of its investigation. Petitioner, although obligated to cooperate with the Office of Disciplinary Counsel, refused to provide his financial records. Eventually, on or about May 18, 1999, the Office of Disciplinary Counsel served a subpoena duces tecum upon Hibernia for petitioner's financial records. The subpoena in question sought production of the following:

> All records from the account of Nicolas Estiverne and Associates Client's Account No. 06500009002 for the period of May 9, 1995 to the present, including but not limited to: all monthly statements, all cancelled checks, and all instruments of deposit.

The return date for the subpoena was June 16, 2000.[4]

While Hibernia received the subpoena in May 1999, it should be noted that petitioner received prior notification that the subpoena for his financial records would be issued. On or about April 22, 1999, the Office of Disciplinary Counsel served petitioner personally with a copy of the proposed subpoena.[5] In spite of this notification, petitioner took no action to quash the subpoena. Petitioner did not notify Hibernia of any objection to the production of his financial records.

Upon receipt, the subpoena was forwarded to Hibernia's Special Processing Department, which was supervised by Ms. Eady. Ms. Eady assigned Brion Workman the task of reviewing the subpoena, assuring compliance with La.

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4 See Appendix B

5 See Appendix C

R.S. 6:333 and gathering the financial records. Mr. Workman attempted to locate the account number, 06500009002, identified in the subpoena. Mr. Workman was unable to locate any such account number. Mr. Workman detected an error in the subpoena. The number referenced in the subpoena was not a Hibernia account number, rather it was the American Banking Association's routing number assigned to all Hibernia accounts in the New Orleans, Louisiana area. Upon making this discovery, Mr. Workman telephoned the Office of Disciplinary Counsel to advise of his findings and seek clarification of the subpoena.

Mr. Workman spoke with Eric Barefield, the Deputy Disciplinary Counsel, who issued the subpoena. Mr. Workman apprised Mr. Barefield of the situation and inquired as to whether Mr. Barefield had a copy of a check or other information that would provide a better description of the financial information the Office of Disciplinary Counsel sought. Deputy Disciplinary Counsel Barefield had in his possession a check drawn on the account of "Attorney Nicolas Estiverne or Portia Estiverne". Mr. Barefield provided Hibernia checking account number 531014685.[6] When Mr. Workman entered this account number into his computer, the banking profile for the petitioner appeared. Mr. Workman

---

6 During the course of its investigation, the Office of Disciplinary Counsel obtained a sworn statement from petitioner. Petitioner's statement revealed that he received a settlement check on behalf of Verna Delone. Petitioner testified that he placed the settlement draft into his trust account. Subsequent to Ms. Delone's complaint, petitioner returned the settlement funds to the defendant by issuing payment from his personal checking account. The Office of Disciplinary Counsel was seeking to determine if the settlement funds were properly protected in a trust account during the two-year fee dispute between Ms. Delone and Mr. Estiverne ensued.

informed Mr. Barefield that there were two accounts for Mr. Estiverne and asked what information the Office of Disciplinary Counsel was seeking. Mr. Barefield advised that he wanted all accounts in the name of Nicolas Estiverne. Mr. Workman further advised Deputy Disciplinary Counsel Barefield that no records could be produced without an affidavit verifying that petitioner had been provided notice of the subpoena.

On or about May 25, 1999, the Office of Disciplinary Counsel provided an affidavit verifying the April 22, 1999 personal service of the subpoena on petitioner.[7] Having received the requisite affidavit, in addition to noting the scope of the subpoena and having received no objection from petitioner, Hibernia produced copies of the monthly statements for the accounts entitled "Nicolas Estiverne or Portia Estiverne" and "Nicolas Estiverne Trust Account".[8]

Subsequent to the production of the aforementioned accounts, Deputy Disciplinary Counsel Barefield again contacted Hibernia. Mr. Barefield's investigation led him to another Hibernia account of petitioner's. Mr. Barefield requested and Hibernia produced the financial records of petitioner's client account number 026217016.[9]

The Office of Disciplinary Counsel reviewed the information produced by Hibernia in response to the subpoena. It was discerned that petitioner may have committed several infractions that warranted disciplinary action. Rather

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7 See Appendix D

8 See Appendix E

9 See Appendix F

than challenge the various complaints and/or face the potential consequences, petitioner resigned from the practice of law in the State of Louisiana.[10]

In the trial court, petitioner filed a Motion for Partial Summary Judgment and respondents filed a Motion for Summary Judgment on the issue of whether Hibernia's production of the financial records was in violation of La. R.S. 6:333. On September 24, 2003, the trial court issued a Judgment denying both motions. No reasons were given for this decision.[11]

On or about October 21, 2003, respondents sought relief from the trial court's denial of the Motion for Summary Judgment. Respondents filed a Supervisory Writ Application with the Court of Appeal, Fourth Circuit of the State of Louisiana. On or about November 8, 2003, the Court of Appeal, in a 2 to 1 decision, denied respondents' Writ Application.[12]

Respondents subsequently filed a Writ for Certiorari to Louisiana Supreme Court on December 12, 2003. On February 20, 2004, the Louisiana Supreme Court granted respondents' Writ Application. The Louisiana Supreme Court, citing the dissenting opinion of the Fourth Circuit Court of Appeal, ordered that Summary Judgment be entered in favor of respondents.[13]

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10 See In re: *Estiverne*, 2000-2501 (La. 9/20/00), 767 So. 2d 39.

11 See Appendix G

12 See Appendix H

13 See Appendix I

SUMMARY ARGUMENT

The Louisiana Supreme Court's ruling was limited to the facts before it. The Louisiana Supreme Court, through the Office of Disciplinary Counsel, conducted an investigation of petitioner's law practice and was fully aware of all the facts germane to the litigation. Due to petitioner's failure to cooperate with the investigation, the Office of Disciplinary Counsel was forced to issue a subpoena to respondents. Respondents had no choice but to comply with the subpoena. Noting that petitioner had waived all rights to privacy, concerning the production of his financial records to the Office of Disciplinary Counsel, the Louisiana Supreme Court properly held that petitioner could not recover any damages.

Petitioner seeks to raise new issues in his Writ Application. Petitioner had not previously alleged claims on behalf of his wife. Petitioner did not allege any constitutional violations at the state court level. The trial, appellate and supreme courts of the State of Louisiana did not address any such issues as they were never presented for consideration. In keeping with the jurisprudence of this Honorable Court, petitioner should not be allowed to raise such issues at this juncture.

ARGUMENT

A. THE LOUISIANA SUPREME COURT'S RULING WAS BASED UPON THE FACTS PRESENTED

La. R.S. 6:333 governs the production of financial

records in the State of Louisiana. In 1999, this statute provided that no bank should disclose any financial records to any person other than the customer, unless the records were disclosed in response to a disclosure demand or pursuant to a written request or authorization for disclosure. A disclosure demand included judicial and administrative subpoenas. Subsection (C) of the statute provided that banks may disclose financial records pursuant to a disclosure demand if each of the following conditions were met:

> 1. A disclosure demand is served on the bank's president, one of the bank's registered agents for service of process, or if applicable, on the bank's counsel of record unless such service on such individuals was expressly waived by the bank;
>
> 2. Prior to the return date, the person requesting the issuance of the disclosure demand furnishes the bank with an affidavit certifying both of the following:
>
> > a. That such disclosure demand, or certified copy thereof, has also been personally served upon each customer named in the disclosure demand to whom the financial records being sought pertain or upon such customer's counsel of record in accordance with Subsection (D) of this section.
> >
> > b. That such service was made at least 15 business days prior to the return date.

3.— The bank has not received written notice that a customer to whom the financial records pertain has taken legal action to enjoin or otherwise restrain the release of the financial records.

La. R.S. 6:333 (F) set forth 14 types of disclosures that were specifically authorized by a bank. None of these pertain to the situation, which is presented to this Honorable Court. The statute in question does not discuss or take into account the authority of the Office of Disciplinary Counsel to monitor the activities of attorneys licensed to practice law in the State of Louisiana.

The Supreme Court for the State of Louisiana has full authority to regulate and direct the practice of law in Louisiana. See La. Const. art. V §5; La. R.S. 37:213; *LSBA v. Edwins,* 540 So. 2d 294 (La. 1989); *Saucier v. Hayes Dairy Products, Inc.*, 373 So. 2d 102, 109, 115 (La. 1978). Pursuant to this authority, the Louisiana Supreme Court adopted and promulgated the Articles of Incorporation of the Louisiana State Bar Association and the Code of Professional Responsibility to regulate attorneys' practices. Effective January 1, 1987, the Rules of Professional Conduct replaced the former Code of Professional Responsibility. The Rules of Professional Conduct have the force and effect of substantive law. *Adams v. Med-Force,* 682 So. 2d 323 (La. App. 4 Cir. 1996).

The disciplinary rules established pursuant to the Louisiana Supreme Court's exercise of its prevailing judicial authority override legislative acts which tend to impede or frustrate that authority. Only legislative enactments that aid the Court's inherent powers will be approved. When it

appears a statute may conflict with a disciplinary rule, the court must first look to see if the statute can be given a reasonable construction that does not contravene the disciplinary rule. *Saucier,* 373 So. 2d at 115, 116-117; *Neely v. Hollywood Marine, Inc.*, 530 So. 2d 1116, 11121 (La. 1988). As a result of this authority, La. R.S. 6:333 must be read in conjunction with the rules, which have been enacted with respect to attorneys.

Specifically, Louisiana Supreme Court Rules of Disciplinary Enforcement Rule XIX, Section 28, is applicable to the instant case. The pertinent subsections are as follows:

> (B) Access to Lawyers' Financial Account Records
>
> > Every lawyer practicing or admitted to practice law in Louisiana shall, as a condition thereof, be conclusively deemed to have consented to the production by the depository institution of records of all financial accounts maintained by the lawyer at any bank or similar institution.
>
> (C) Request for Production of Records
>
> > A request by disciplinary counsel directed to a bank or other financial institution for production of records pursuant to this section shall certify that the request is issued in accordance with the requirements of this section and section 29 of these rules of lawyer disciplinary enforcement.

Louisiana Supreme Court Rules of Disciplinary Enforcement Rule XIX, Section 29 states:

A. Generally. Whenever disciplinary counsel has probable cause to believe financial accounts of a lawyer that contain, should contain, or have contained funds belonging to clients or third parties have not been properly maintained or that the funds have not been properly maintained, or that funds have not been properly handled, disciplinary counsel shall request the approval of the chair of a hearing committee selected in order from the roster established by the board to initiate an investigation for the purpose of verifying the accuracy and integrity of all accounts maintained by the lawyer in any bank or similar institution. If the reviewing member approves, counsel shall proceed to verify the accuracy of the financial accounts. If the reviewing member denies approval, counsel may submit the request for approval to one other chair of a hearing committee selected in order from the roster established by the board.

B. Confidentiality. Investigations, examinations, and verifications shall be conducted so as to preserve the private and confidential nature of the lawyer's records insofar as is consistent with these rules and the lawyer client privilege.

A close analysis of the proceedings below clearly establishes that the Louisiana Supreme Court enunciated a reasonable interpretation of La. R. S. 6:333 which did not contravene the disciplinary rules.

Petitioner, as of the issuance of the subpoena in1999,

was an attorney duly admitted and licensed to practice law in the State Louisiana. As such, he was bound by the rules of the Louisiana Supreme Court which govern the behavior of all attorneys licensed in the State of Louisiana. Mr. Estiverne waived any privacy rights and/or consented to the production of his banking records under Rule XIX, §§ 28(B) and (C) in the event the Office of Disciplinary Counsel conducted an investigation concerning his law practice. The subpoena issued by the Office of Disciplinary Counsel was in furtherance of the authority granted not only by the Louisiana Supreme Court but by Mr. Estiverne as a practicing attorney in the State of Louisiana. Mr. Estiverne had no privacy rights concerning his banking records as it pertained to the Office of Disciplinary Counsel.

Respondents were compelled to produce petitioner's financial records. Respondents were served with a disclosure demand (the subpoena duces tecum) as defined by La. R.S. 6:333. Demand was issued by the Office of Disciplinary Counsel for the bank records of a lawyer licensed to practice law in the State of Louisiana. As articulated in the dissent from the Fourth Circuit Court of Appeal, when La. R.S. 6:333 (C) is read in conjunction with Louisiana Supreme Court Rule XIX, §§ 28 (B), 28 (C), 29 (A) and 29 (B), respondents were obligated to comply with the subpoena as a lawyer is deemed to have consented to the bank providing the information.

Petitioner's sole argument is that he was not provided notice that his personal financial records were subject to subpoena and, therefore, respondents should not have complied with the subpoena. Petitioner's argument, however, obscures the undisputed facts. The Office of Disciplinary Counsel,

which is the enforcement arm of the Louisiana Supreme Court, was investigating a complaint filed against petitioner. During the investigation, petitioner gave a sworn statement to the Office of Disciplinary Counsel wherein he placed his personal bank account at issue. Specifically, petitioner advised the Office of Disciplinary Counsel that he placed settlement funds into his trust account. When petitioner returned the funds to the settling defendant, however, petitioner repaid the funds through the issuance of a personal check. Petitioner's actions raised the question as to whether the settlement funds were properly protected as required of all Louisiana lawyers. The Office of Disciplinary Counsel's interest in such matters is obvious and well within the duty to regulate the practice of law.

Additionally, Louisiana lawyers are required to cooperate in investigations conducted by the Office of Disciplinary Counsel. Here, petitioner failed and/or refused to live up to that obligation. The Office of Disciplinary Counsel made numerous requests for his financial records. Petitioner refused to provide any information. Eventually, the Office of Disciplinary Counsel turned to other means to gather petitioner's financial records. The issuance of the subpoena duces tecum to Hibernia was one such method. It was petitioner's actions or failure to cooperate which lead to the issuance of the subpoena.

Moreover, petitioner had plenty of time to prevent the issuance of his financial records, if that was his desire. The Office of Disciplinary Counsel served a copy of the proposed subpoena on petitioner on April 22, 199. The subpoena indicated not only the records sought, but also set forth a return

date of June 14, 1999. Thus, petitioner had almost two months to prevent the production of his financial records. Petitioner, a lawyer at the time, was aware, or should have been aware, that he could take legal action to prevent Hibernia from producing his financial records. Petitioner could have filed a Motion to Quash the subpoena. He could have sent a written letter of objection to Hibernia setting forth his opposition to the production of his financial records. Petitioner could have taken any number of steps to preclude respondents from producing his financial records.[14] However, petitioner did not avail himself of any of these methods. He did not file a Motion to Quash, submit written objections or take any action, which would have prevented Hibernia from producing his financial records. In the absence of a directive from petitioner, respondents had no choice but to comply with a valid subpoena.

It is clear that the Louisiana Supreme Court's grant of the Writ Application and Summary Judgment on behalf of respondents was limited to the facts of this case. The Louisiana Supreme Court, in an exercise of its mandate to regulate the practice of law and the conduct of lawyers, requested the financial records of an attorney alleged to have violated the Rules of Professional Conduct. Respondents did not have any reason to question the validity of the subpoena and without any objection from petitioner, respondents were

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14 Judicial notice was taken of Mr. Estiverne's opposition to Hibernia's production of his financial records in other instances. The office of Disciplinary Counsel and the New Orleans District Attorney's office had issued subpoena to Hibernia for Mr. Estiverne's bank records as part of several other investigations. Mr. Estiverne filed motions to quash subpoenas in response to each of the request.

obligated to comply with the subpoena. The Louisiana Supreme Court's decision acknowledges the difficult position petitioner, by his failure to cooperate, placed respondents. On one hand, respondents could be held in contempt for failing to comply with the subpoena. On the other, petitioner could sue respondents for producing his financial records. The Louisiana Supreme Court's decision chills similar actions against innocent third parties such as respondents.

B. NEW CLAIMS AND ISSUES SHOULD NOT BE CONSIDERED BY THIS HONORABLE COURT

Petitioner raises new issues in his writ application. Specifically, petitioner makes the following allegations for the first time before this Honorable Court:

1. That the rights of his wife have been violated;

2. That Louisiana Supreme Court Rules of Disciplinary Enforcement Rule XIX, §§ 28 and 29 are broad and over reaching;

3. That he and his spouse were denied Due Process and Equal Protection rights guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution; and

4. That Louisiana State Supreme Court Rules of Disciplinary Enforcement Rule XIX is unconstitutional.

In the Petition for Damages, petitioner only asserts claims on behalf of himself. The only plaintiff listed is petitioner.[15] At no time, did plaintiff amend his petition to name

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[15] See Appendix A

his wife as an additional plaintiff. Mrs. Estiverne is not a party to the instant lawsuit. Accordingly, the Louisiana courts were never presented with and never passed judgment on any claim asserted on her behalf. Accordingly, this Honorable Court should not address any claims asserted on behalf of petitioner's wife.

With respect to the constitutional issues involving Louisiana Supreme Court Rules of Disciplinary Enforcement Rule XIX, §§ 28 and 29 alleged violations of the Fourth and Fourteenth Amendments to the United States Constitution, this Honorable Court should also decline to recognize petitioner's claim. This Court has long held that it will not decide federal constitutional issues raised before it for the first time on review of a state court's decision. See *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161 (1969). In his Petition for Damages, petitioner did not assert any federal constitutional issues. Such issues were never raised, preserved or passed upon in the Louisiana State court. Thus, the record is likely to be inadequate, since it was not compiled with those questions in mind.

Considering that petitioner did not challenge the constitutionality of the relevant Louisiana Supreme Court rules or allege a violation of Fourth or Fourteenth Amendments at the state court level, his petition for certiorari has a fatal flaw. The petition should, therefore, be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied and the Judgment of the Louisiana Supreme Court affirmed.

Respectfully submitted,

By: _____

Joseph B. Morton, III
Duplass, Zwain, Bourgeois & Morton
Three Lakeway Center, Suite 2900
3838 N. Causeway Boulevard
Metairie, Louisiana 70002
(504) 832-3700

APPENDIX A

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO:2000-13428 DIVISION C SECTION 6

Filed Aug 30, 2000

NICOLAS ESTIVERNE

VERSUS

HIBERNIA CORPORATION, PAULA EADY, AND

THEIR INSURER XYZ INSURANCE COMPANY

FILED:_____ _____

PETITION FOR DAMAGES

The petition of Nicolas Estiverne, an adult of the full age of majority, domiciled in the Parish of Orleans, State of Louisiana, respectfully represents:

I.

Defendant Hibernia Corporation is a Louisiana Corporation licensed to do business in the State of Louisiana and at all times herein subject to La. R.S. 6:333 of the Banking Laws and the employer of Paula Eady.

II.

Defendant Paula Eady is domiciled in the State of Louisiana, and at all times herein an employee of defendant Hibernia Corporation and responsible for all subpoenas served on Hibernia Corporation.

III.

On or about May 1999, Hibernia Corporation, through one of its employee named Paulette Simoneaux, received a subpoena from the Louisiana Attorney Disciplinary Board for all records from account of Nicolas Estiverne and Associates Clients Account #06500009002, for the period of May 1995 to the present, including but not limited to all monthly statements, all canceled checks, and all instruments of deposit.

IV.

On or about February 21, 2000, during the deposition of Paula Eady, a defendant herein, plaintiff found out that an employee of defendant Hibernia Corporation named Brian Workman delivered to the Louisiana Attorney Disciplinary Board two account numbers that were not even in the subpoena.

V.

On or about February 21, 2000, during the deposition of Gary Ryan, the Registered Agent for Service of Process for defendant Hibernia Corporation, that Paulette Simoneaux was never authorized to receive service of process for Hibernia Corporation.

VI.

On or about February 25, 2000, during the deposition of Eric K. Barefield, Deputy Disciplinary Counsel for the Louisiana Attorney Disciplinary Counsel, that an eniployee of defendant Hibernia Corporation named Brian Workman told hirn that he did not need a subpoena to get the records from the Bank.

VII.

On or about February 25, 2000, plaintiff found out, during the deposition of Eric K. Barefield, that he did not sign an affidavit certifying under oath that a copy of the subpoena was servcd on plaintiff before the Bank could release the records as required by R.S. 6:333.

VIII.

On or about February 21, 2000, defendant Paula Eady stated under oath that records are provided to Lawyers even when the subpoenas they issue are wrong or incomplete, all in total disregard for R.S. 6:333.

IX.

As a result of defendant Hibernia Corporation's violation of the law, plaintiff suffered severe loss of income, mental distress, public einbarrassment and humiliation, loss of future employment.

X.

Defendant Paula Eady was identified by Brian Workman as the person who ordered the records released without a Bona Fide subpoena as required and in compliance with R.S. 6:333, and she is therefore liable for having violated plaintiff's privacy rights under R.S. 6:333.

XI.

Defendant Hibernia Corporation is liable individually and under the doctrine of Respondeat Superior because Brian Workman stated that this is Hibernia Corporation Policy to release records to Lawyers even when their subpoenas are no good.

XII.

Plaintiff avers that he is entitled to such damages as are reasonable under the premises, particularly for invasion of privacy, loss of income, loss of future employment, mental distress and pain, public embarrassment and humiliation and all other damages that will be proved at the trial of this case.

XIII.

Plaintiff contends that the defendants total disregard for the law is the sole cause of the harm that was done to the plaintiff herein and plaintiff is praying for a trial by Jury.

WHEREFORE, plaintiff prays that after due proceedings there be judgment herein in favor of petitioner Nicolas Estiverne and against the defendants Hibernia Corporation

and Paula Eady and their insurer for such damages as are reasonable under the premises, together with legal interest until paid and for all costs of these proceedings. Plaintiff prays for a trial by Jury.

Respectfully Submitted,

/s/ Nicolas Estiverne
NICOLAS ESTIVERNE
2426 LOUISIANA AVENUE
NEW ORLEANS, LOUISIANA, 70115
TEL: 504-891-7411

APPENDIX B

Investigatory Subpoena

SUPREME COURT, STATE OF LOUISIANA

LOUISIANA ATTORNEY DISCIPLENARY BOARD

In Re: Nicolas Estiverne
SUBPOENA

CONFIDENTIAL INVESTIGATION Matter No. 0003427

TO:

Paulette Simoneaux,- Custodian of Record
Hibernia National Bank
225 Baronne Street - 11th Floor
New Orleans, LA 70130
PERSONAL SERVICE ONLY

YOU ARE HEREBY COMMANDED to appear before Disciplinary Counsel at the place, and time shown below to state under oath your knowledge of facts relevant to the above matter. This subpoena is issued by authority granted in Supreme Court Rule XIX, Section 14B.

PLACE	DATE
The Office of Disciplinary Counsel 2800 Veterans Memorial Blvd. Suite 310 Metairie, LA 70002	June 16, 1999
	TIME 9:00A.M.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or objects(s):*

ALL RECORDS FROM THE ACCOUNT OF NTICOLAS ESTIVERNE AND ASSOCIATES CLIENTS ACCOUNT NO. 06500009002 FOR PERIOD OF MAY 9,1995 TO THE PRESENT, INCLUDING BUT NOT LIMITED TO: ALL MONTHLY STATEMENTS, ALL CANCELED CHECKS. AND ALL INSTRUMENTS OF DEPOSIT.

See additional information on reverse.

DISCIPLINARY COUNSEL	DATE
/s/ Eric K. Barefield Signature	3/9/99

APPROVED BY:	QUESTIONS MAY BE ADDRESSED TO:
/s/ Charles Plaittsmeier Chief Disciplinary Counsel	Eric K. Barefield, Esq. Office of Disciplinary Counsel 2800 Vet. Mem. Blvd. Suite 310 Metairie, LA 70002 Phone No: (504) 828-1414
DATE: March 12, 1999	

APPENDIX C

Investigatory Subpoena

SUPREME COURT, STATE OF LOUISIANA

LOUISIANA ATTORNEY DISCIPLINARY BOARD

In Re: Nicolas Estiverne

SUBPOENA

CONFIDENTIAL INVESTIGATION Matter No. 0003427

TO:

Paulette Simoneaux- Custodian of Record
Hibernia National Bank
225 Baronne Street - 11th Floor
New Orleans, LA 70130

PERSONAL SERVICE ONLY

YOU ARE HEREBY COMMANDED to appear before Disciplinary Counsel at the place, and time shown below to state under oath your knowledge of facts relevant to the above matter. This subpoena is issued by authority granted in Supreme Court Rule XIX, Section 14.B.

PLACE	DATE
The Office of Disciplinary Counsel 2800 Veterans Memorial Blvd. - Suite 310 Metairie, LA 70002	June 16, 1999
	TIME 9:00A.M.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or objects(s):*

ALL RECORDS FROM THE ACCOUNT OF NICOLAS ESTIVERNE AND ASSOCIATES CLIENTS ACCOUNT NO. 06500009002 FOR PERIOD OF MAY 9, 1995 TO THE PRESENT, INCLUDING BUT NOT LIMITED TO: ALL MONTHLY STATEMENTS, ALL CANCELED CHECKS, AND ALL INSTRUMENTS OF DEPOSIT.

See additioncal information on reverse.

DISCIPLINARY COUNSEL	DATE
/s/ Eric K. Barefield Signature	3/9/99

APPROVED BY:	QUESTIONS MAY BE ADDRESSED TO:
/s/ Charles Plaittsmeier Chief Disciplinary Counsel	Eric K. Barefield, Esq. Office of Disciplinary Counsel 2800 Vet. Mem. Blvd. Suite 310 Metairie, LA 70002 Phone No: (504) 828-1414
DATE: March 12, 1999	

Investigation Subpoena

RETURN OF SERVICE

Received by Server	DATE 19 April 1999	PLACE 421 Loyola Ave. 3rd floor (301)
Served	DATE 22 April 1999	PLACE 2426 Louisiana Ave. (Law offices) N.O., LA
SERVED ON (Name) Nicolas Estiverne, Attorney		SERVED BY: Paul McKenda II TITLE: Deputy Civil Sheriff

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the State of Louisiana that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on 22 April 1999 /s/ Paul McKenda, II
Signature of server
421 Loyola Ave., 301 N.O., LA
Address of *Server*

Please return to person requesting service.

ADDITIONAL INFORMATION

APPENDIX D

AFFIDAVIT

The undersigned did hereby have a copy of the subpoena and a letter of notification of the request for subpoena of certain records directed to the-Hibernia National Bank delivered to Nicolas Estiverne, Attorney at Law, through personal service on April 22, 1999.

/s/ Mary Barbier
Mary Barbier

SWORN TO AND SUBSCRIBED before me
this 25th day of May, 1999.
NOTARY PUBJC

/s/ Eric K. Barefield
NOTARY PUBLIC

APPENDIX E

HIBERNIA
MEMBER FDIC

June 17, 1999

Eric K Barefield, Esquire
Office of Disciplinary Counsel
2800 Veterans Memorial Blvd., Suite 310
Metairie, LA 70002

Re: Nicolas Estiverne
Subpoena

Dear Mr. Barefield:

In compliance with the above referenced subpena, enclosed herewith are copies of the following records:

1) Statements for account number 531014685, titled Attorney Nicolas Estiverne or Mrs. Portia Estiverne for the time frame requested;
2) Statements for account number 812236822, titled Nicolas Estiverne's Trust Acct. for the time frame requested.

The total cost for the reproduction of the above described records is $103.00 and consists of 3 hours of research and reproduction @ $20.00 per hour and 172 copies @ $0.25 each. If I can be of further assistance, please feel free to call

me at 504-533-5262.

Sincerely,

/s/ Brion Workman

Brion Workman
Special Processing Department

APPENDIX F

LOUISIANA ATTORNEY DISCIPLINARY BOARD

OFFICE OF THE DISCIPLINARY COUNSEL
4000 S. Sherwood Forest Blvd.
Suite 607
Baton Rouge, Louisiana 70816

October 18, 1999

METAIRIE OFFICE
2800 Veterans Mem.Blvd.
Suite 310
Metairie, Louisiana 70002
(504) 828-1414
1-800-518-1518
FAX (504) 828-1416

(225) 293-3900
1-800-326-3022
FAX (225) 293-3300

REPLY METAIRIE

Mr. Brian Workman
Hibernia National Bank
Post Office Box 61540
New Orleans, LA 70161-1540

RE: 99-DB-075
Nicolas Estiverne

Filed Oct 21 1999

Dear Mr. Workman:

Please furnish this office with copies of all cancelled checks and instruments of deposit which would correspond to the

monthy trust account statements from Mr. Estiverne's account, which you previously provided to this office.

Sincerely,

/s/ Eric K. Barefield
Eric K. Barefield
Dcputy Diciplinary Counsel

EKB/mkb

EXHIBIT G

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2000-13428 DIVISION "C" SECTION 6

NICHOLAS ESTIVERNE

VERSUS

HIBERNIA CORPORATION, ET AL

NOTICE OF SIGNING OF JUDGMENT

In accordance with C.C.P. Article 1913, you are hereby notified that Judgment in the captioned matter was signed on September 24, 2003.

Nicolas Estiverne
2426 Louisiana Ave.
New Orleans, LA 70115

Joseph B. Morton, III
Attorney at Law
3838 N. Causeway Blvd.
29th Floor
Metairie, LA 70002

New Orleans, Louisiana, this 24th day of September, 2003

/s/Michelle Mouton
Michelle Mouton, Law Clerk
Division "C"

RECEIVED Sep 26 2003

CIVIL DISTRICT COURT FOR THE

PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2000-13428 DIVISION "C" SECTION 6

NICHOLAS ESTIVERNE

VERSUS

HIBERNIA CORPORATION, ET AL

JUDGMENT

This matter came for hearing on Motion for Partial Summary Judgment filed herein on behalf of Nicolas Estiverne and on Motion for Summary Judgment filed herein on behalf of Paula Eady, Hibernia Corporation: and St. Paul Fire and Marine Insurance Company.

After considering the pleadings, the argument of counsel and the law:

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment filed herein on behalf of Nicolas Estiverne and the Motion for Summary Judgment filed herein on behalf of Paula Eady, Hibernia Corporation and St. Paul Fire and Marine Insurance Company be, and the same are hereby denied.

JUDGMENT READ, RENDERED AND SIGNED in New Orleans, Louisiana, this 24th day of September, 2003.

/s/ Roland L. Belsome

JUDGE ROLAND L. BELSOME

APPENDIX H

NO. 2003-C-1850
COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

NICOLAS ESTIVERNE

VERSUS

HIBERNIA CORPORATION, ET AL.

IN RE: PAULA EADY, ET AL.
APPLYING FOR: SUPERVISORY WRIT
DIRECTED TO: HONORABLE
ROLAND L. BELSOME, JUDGE
CIVIL DISTRICT COURT, ORLEANS, PARISH
DIVISION "C", 2000-13428

WRIT DENIED

We find that the trial court did not err in denying the motion for summary judgment.

New Orleans, Louisiana this ___day of **NOV 18, 2003**

/s/ JUDGE TERRI LOVE

Tobias, L. ,Dissents and assigns reasons
JUDGE MAX N. TOBIAS JR.

/s/ JUDGE DAVID S. GORBATY

NICOLAS ESTIVERNE	*	**NO. 2003-C-1850**
VERSUS	*	**COURT OF APPEAL**
HIBERNIA CORPORATION	*	**FOURTH CIRCUIT**
ET AL.	*	**STATE OF**
	*	**LOUISIANA**

* * * * * * * *

TOBIAS, J., DISSENTS AND ASSIGNS REASONS

I respectfully dissent.

Rule XIX §§ 28 B and C of the Rules of Disciplinary Enforcement promulgated by the Supreme Court of Louisiana state:

B. **Access to Lawyers Financial Records.** Every Lawyer practicing or admitted to practice law in Louisiana shall, as a condition thereof, be *conclusively deemed to have consented* to the production by the depository institution of records of *all* financial accounts maintained by the lawyer in any bank or similar institution.

C. **Request for Production of Records.** A request by Disciplinary Counsel directed to a bank or other financial institution for production of records pursuant to this Section shall certify that the request is issued in accordance with the requirements of this section and section 29 of these Rules of Lawyer Disciplinary Enforcement. [Emphasis in italics and underlined added.]

Rule XIX, Sec. 29 of the Rules of Disciplinary Enforcement states:

A. **Generally.** Whenever disciplinary counsel has probable cause to believe that financial accounts of a lawyer that contain, should contain, or have contained funds belonging to clients or third parties have not been properly maintained or that funds have not been properly handled, disciplinary counsel shall request the approval of the chair of a hearing committee selected in order from the roster established by the board to initiate an investigation for the purpose of verifying the accuracy and integrity of all accounts maintained by the lawyer in any bank or similar institution. If the reviewing member approves, counsel shall proceed to verify the accuracy of the financial accounts. If the reviewing member denies approval, counsel may submit the request for approval to one other chair of a hearing committee selected in order from the roster established by the board.

B. **Confidentiality.** Investigations, examinations, and verifications shall be conducted so as to preserve the private and confidential nature of the lawyer's records insofar as is consistent with these rules and the lawyer-client privilege.

The Supreme Court of Louisiana has full authority to regulate and direct the practice of law in this state. La. Const. art. V Sec. 5; La. R.S. 37:213; *LSBA v. Edwins,* 540 So. 2d 294 (La. 1989); *Saucier v. Hayes Diary Products, Inc.,* 373 So. 2d 102, 109, 115 (La. 1978); *Meunier v. Bernich,* 170 So. 567 (La. App. Orleans 1936). In my view, these rules, when read with La. R.S. 6:333 C, clearly direct that when a subpoena duces tecum is directed by disciplinary counsel to a financial institution for any bank record of a lawyer licensed to practice in Louisiana, the bank is obligated to comply and the lawyer is deemed to have consented to the bank providing the information.

In the case at bar, plaintiff/respondent, Nicolas Estiverne,[1] was aware of the subpoena issued by disciplinary counsel to Hibernia National Bank. The bank was obligated to comply with the subpoena regardless of technical errors contained within the subpoena because the Supreme Court rule grants to disciplinary counsel the right to obtain all financial records of a lawyer maintained by the financial institution. The plaintiff/respondent, if he did not want the records produced, was obligated to attempt to quash of the subpoena. Mr. Estiverne failed to try to quash the subpoena.

I would, therefore, grant the writ, and reverse the decision of the trial court, thereby granting the relators' motion for summary judgment.

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[1] Although subsequently disbarred, at the time the subpoena duces tecum issued, Mr. Estiverne was a lawyer admitted to the practice of law in Louisiana.

APPENDIX I

The Supreme Court of the State of Louisiana

NICOLAS ESTIVERNE

vs. NO. 2003-CC-3411

HIBERNIA CORPORATION, ET AL.

IN RE: Hibernia Corporation et al; Eady, Paula; St. Paul Fire & Marine Insurance Co.; - Defendant (s); Applying for Supervisory and/or Remedial Writs, Parish of Orleans, Civil District Court Div. C, Nos. 2000-13428; to the Court of Appeal, Fourth Circuit, No. 2003-C-1850

February 20, 2004

Granted. The judgment of the trial court is reversed. Summary judgment is granted in favor of relators for the reasons assigned in the opinion of the dissenting judge in the court of appeal.

CDK
JPV
CDT
JTK

CALOGERO, C. J., would grant and docket.
JOHNSON, J. Dissents with reasons.
WEIMER, J., concurs.

Supreme Court of Louisiana February 20, 2004

/s/ Katherine A. Fontana
Deputy Clerk of Court, For the Court

SUPREME COURT OF LOUISIANA

NO. 03-CC-3411

NICOLAS ESTIVERNE

Versus

HIBERNIA CORPORATION

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS

JOHNSON, J., would deny the writ application for the following reasons:

It is clear that pursuant to Supreme Court Rule XIX, §§ 28[1] and 29[2], the ODC has the power to request the finan-

---

[1]Supreme Court Rule XIX, § 28 provides in pertinent part:

> B. Access to Lawvers' Financial Account Records. Every lawyer practicing or admitted to practice law in Louisiana shall, as a condition thereof, be conclusively deemed to have consented to the production by the depository institution of records of all financial accounts maintained by the lawyer in any bank or similar institution.
>
> C. Request for Production of Records. A request by disciplinary counsel directed to a bank or other financial institution for production of records pursuant to this Section shall certify that the request is issued in accordance with the requirements of this Section and Section 29 of these Rules of Lawyer Disciplinary Enforcement.

[2] Supreme Court Rule XIX, § 29 provides:

> A. Generally. Whenever disciplinary counsel has probable cause to believe that financial accounts of a lawyer that contain, should

cial records of a lawyer. However, in this case, the Office of Disciplinary Counsel ("ODC") served Hibernia National Bank with a subpoena duces tecum, requesting records from Mr. Estiverne's *client* account. The account number listed on the subpoena was incorrect, so Hibernia's employee, Brion Workman, telephoned the ODC. Following a conversation with Eric Barefield, the deputy disciplinary counsel listed on the subpoena, Mr. Workman forwarded to the ODC copies of statements from Mr. Estivernie's client account, as well as statements from Mr. Estiverne's and his wife's *personal* account.

The dissenting court of appeal opinion states, in pertinent part:

> In the case at bar, plaintiff/respondent, Nicholas Estiverne, was aware of the subpoena issued by disciplinary counsel to Hibernia Bank . . .. The plaintiff/respondent, if he did not want the records produced, was obligated to attempt to quash of [sic] the subpoena. Mr. Estiverne failed to try to quash the subpoena.

(footnote continued)
contain, or have contained funds belonging to clients or third parties have not been properly maintained or that the funds have not been properly handled, disciplinary counsel shall request the approval of the chair of a hearing committee selected in order from the roster established by the board.

B. Confidentiality. Investigations, examinations, and verifications shall be conducted so as to preserve the private and confidential nature of the lawyer's records insofar as is consistent with these rules and the lawyer-client privilege.

Whether Mr. Estiverne was "aware of the subnoena issued" bv the ODC is of no moment, as the request for records from the personal account was not contained in the subpoena. Th failure to give Mr. Estiverne notice that the ODC was requesting financial records regarding his and his wife's personal account served to deprive him of the right to attempt to quash the subpoena.

For the foregoing reasons, I would deny the bank's writ application, and allow the trial court's decision to stand.